IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs July 29, 2008

STATE OF TENNESSEE v. JAMES ALBERT TAYLOR

Direct Appeal from the Criminal Court for Hamilton County
No. 253238 Barry A. Steelman, Judge

No. E2007-02878-CCA-R3-CD - Filed February 17, 2009

The Defendant-Appellant, James Albert Taylor, entered open guilty pleas[1] in the Hamilton County Criminal Court to one count of aggravated burglary and one count of aggravated assault, both Class C felonies, and conceded his status as a Range II, multiple offender. On September 9, 2005, Taylor was sentenced to six years for the aggravated burglary charge and ten years for the aggravated assault charge to be served concurrently for an effective sentence of ten years at thirty-five percent in the Department of Correction. In his appeal, Taylor argues the trial court erred by (1) accepting his guilty plea without determining the voluntariness of the plea under State v. Mackey, 553 S.W.2d 337 (Tenn. 1997) and (2) imposing an effective ten-year sentence in confinement in light of Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531 (2004). Upon review, Taylor's judgments of conviction are reversed, the sentences imposed by the trial court are vacated, and the case is remanded for a resentencing hearing, following Taylor's election to proceed under the pre-2005 sentencing act or the amended sentencing act accompanied by Taylor's written waiver of his ex post facto protections.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court Reversed and Case Remanded

CAMILLE R. MCMULLEN, J., delivered the opinion of the court, in which JOSEPH M. TIPTON, P.J., and JERRY L. SMITH, J., joined.

Charles P. Dupree (on appeal) and Lorrie Miller (at trial), Chattanooga, Tennessee, for the appellant, James A. Taylor.

Robert E. Cooper, Jr., Attorney General and Reporter; Deshea Dulany, Assistant Attorney General; William H. Cox, District Attorney General; and Jason Thomas, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

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[1] A defendant enters an open guilty plea where he or she pleads guilty to a charge but authorizes the trial court to determine the length and manner of the sentence for this charge.

Guilty Plea Hearing. At the guilty plea hearing on July 26, 2005, the State outlined the terms of the guilty plea agreement, and the trial court questioned Taylor on the voluntariness of his open plea:

THE STATE: In 253238, Mr. Taylor is charged with two counts: count 1, aggravated burglary as a C felony and count 2, aggravated assault as a C felony.

He's agreed to come before the Court this morning and plead open to both counts as C felonies, conceding that he is a Range II offender, which will subject him to a range of six to ten years. He's pleading open, so he will be referred, pursuant to your approval, Judge, to probation and parole for a [presentence investigation] report.

The State will recommend somewhere between six and ten years, depending on that report, and also depending on the witnesses as we intend for them to testify at a sentencing hearing. So we'll schedule that here, Judge, [on] the heels of this particular plea proceeding, and [another attorney for the State], I think, will be prepared for the State to handle the sentencing hearing on the count 1 and count 2.

. . . .

THE COURT: [Mr. Taylor, your attorney has] gone over the indictment, told you you're charged in two indictments. 252823, a 3-count indictment charging possession of cocaine for resale, public intoxication, and possession of drug paraphernalia, will be dismissed.

And case number 253238, she's told you aggravated burglary and aggravated assault are C felonies carrying three to fifteen years. As a Range II offender, you're subject to six to ten years at 35 percent. In other words, you have to serve 35 percent of the sentence before you're eligible for parole. Of course, any sentence under ten years, there's a presumption that you and the State would benefit from an alternative form of punishment. You're aware of that.

Okay. Now, you understand, of course, you do not have to, to plead guilty. You have the right to a trial by jury, the right to a speedy trial.

If you had a trial, you would sit at the counsel table with [your attorney] throughout the trial, so you'd be able to

talk to her, you could ask her questions, you could consult with her, you could advise her.

During jury selection, you can look over the potential jurors, discuss those with her, decide how to exercise the challenges you have.

After the jury is selected, the burden is on the State to prove your guilt beyond a reasonable doubt to the satisfaction of the jury. To meet the burden, the State would have to call witnesses to the stand to establish the elements of the offense and convince the jury of your guilt. You'd be able to see the State witnesses, you could hear the State witnesses, you could confront the State witnesses. [Your attorney] could cross examine the State witnesses.

At the close of the State's proof, you would have an opportunity, if you wanted to, to call witnesses, present other evidence on your own behalf. You could testify if you wanted to. You would have to waive your constitutional right to remain silent.

You also have a constitutional right to effective assistance of counsel. Are you satisfied [with] the way [your attorney] has represented you?

TAYLOR: Yes.

THE COURT: She done anything you didn't want her to do?

TAYLOR: No.

THE COURT: Has she done everything within reason you've asked of her?

TAYLOR: Yes.

THE COURT: Okay. You do appear to be alert today. Your mind is clear, you understand what's happening?

TAYLOR: Yes.

THE COURT: And, [Defense Counsel], you agree there is a factual basis on which a jury could convict?

DEFENSE COUNSEL: Yes, Your Honor.

THE COURT: The Court finds that James Albert Taylor is freely and voluntarily of his own accord knowingly waiving his right to a trial by jury in case 253238.

The Court further finds there's a factual basis for a finding of guilt. Count 1, the Court finds you guilty of aggravated burglary, C felony, Range II offender. You are subject to six to ten years at 35 percent.

In Count 2, the Court finds you guilty of aggravated assault, a C felony, Range II offender. Again, you're subject to six to ten years at 35 percent.

You will be referred to the probation office for a presentence report . . . .

And I will have to sentence you according to the facts, any witnesses you call, any witnesses the State may call. I'll consider the presentence report, I'll consider the sentencing guidelines, which I had told you one is that there is a presumption of an alternative form of punishment, and I'll set your punishment somewhere between six and ten years [2-7].

. . . .

Sentencing Hearing. At Taylor's September 9, 2005 sentencing hearing, the trial court imposed a sentence of confinement:

THE COURT: Okay. All right. [Defense Counsel], I don't think much of the [aggravated] burglary, but y'all agreed, I'll set it at six years.

On the aggravated assault, I do think it's a bad aggravated assault, ten years, and that's at 35 percent, so it's a total of ten years at 35 percent. [20-21]

. . . .

I. Failure to File a Timely Notice of Appeal. We must initially address the State's contention that Taylor failed to file a timely notice of appeal before addressing Taylor's other issues. The record shows that Taylor did not file a direct appeal immediately following the imposition of his sentence. Instead, Taylor filed a petition for post-conviction relief and later an amended petition requesting, inter alia, a delayed appeal. We note that the record does not include Taylor's petition or amended petition for post-conviction relief and does not indicate when these two petitions were filed. However, on June 7, 2007, in response to his amended petition, the trial court entered an order allowing Taylor to file a delayed appeal to this court, in light of his trial counsel's failure to comply

with Tennessee Rule of Criminal Procedure 37(d). See Tenn. R. Crim. P. 37(d) (requiring the filing of a timely notice of appeal or a written waiver of appeal). The trial court's order did not give Taylor a deadline for filing his Notice of Appeal. On September 29, 2007, the trial court appointed Taylor new counsel for the purpose of filing his delayed appeal. Taylor filed his Notice of Appeal on October 19, 2007.

Although the trial court's June 7, 2007 order allowed Taylor to file a delayed appeal, he did not file his Notice of Appeal until October 19, 2007. As the State aptly notes, the date of the order granting the delayed appeal begins the thirty-day time period within which the defendant may file a notice of appeal. See State v. Cordell, 645 S.W.2d 763, 765 (Tenn. Crim. App. 1982); see also State v. Michael Parks, No. 01C01-9506-CC-00177, 1996 WL 374106, at *4 (Tenn. Crim. App., at Nashville, July 5, 1996); Michael S. Hurt v. State, No. 01C01-9207-CC-00213, 1993 WL 39751, at *3 (Tenn. Crim. App., at Nashville, Feb. 18, 1993). In this case, Taylor was not appointed new counsel until September 29, 2007, and his Notice of Appeal was filed less than thirty days after this appointment. Rule 4(a) of the Tennessee Rules of Appellate Procedure states that "in all criminal cases the 'notice of appeal' document is not jurisdictional and the filing of such document may be waived in the interest of justice." Given the brief lapse of time between the appointment of new counsel and the filing of Taylor's Notice of Appeal, we conclude that the "interest of justice" is best served by granting a waiver in this case. See Tenn. R. App. P. 4(a); see also Crittenden v. State, 978 S.W.2d 929, 932 (Tenn. 1998).

II. Guilty Plea. Taylor contends that the trial court erred in accepting his guilty plea without determining the voluntariness of his plea under State v. Mackey. See State v. Mackey, 553 S.W.2d 337, 339 (Tenn. 1997), superseded on other grounds by Tenn. R. Crim. P. 37(b) and Tenn. R. App. P. 3(b). First, Taylor argues that the trial court failed to explain the possibility that he would receive a sentence of confinement. Second, Taylor contends that the trial court failed to explain the possibility that later convictions would be subject to enhancement and an increased range of punishment because of his guilty pleas in this case. The State argues that this court does not have jurisdiction to determine the voluntariness of Taylor's guilty pleas on direct appeal. Further, the State contends that Taylor is required to challenge the voluntariness of his plea in a petition for post-conviction relief, which allows for a more fully developed record.

The Tennessee Supreme Court in State v. Wilson decided a nearly identical issue regarding the voluntariness of a guilty plea. See State v. Wilson, 31 S.W.3d 189, 192 (Tenn. 2000). In the Wilson case, the court held that "the right to appeal a plea of guilty entered in the trial court is severely limited to those cases which fit within one of the narrow exceptions enumerated in Tenn. R. Crim. P. 37(b) or Tenn. R. App. P. 3(b)." Id. at 192 (citing Patterson v. State, 684 S.W.2d 110, 111-12 (Tenn. Crim. App. 1984)). Tennessee Rule of Criminal Procedure 37(b) (2005) states:

> **(b) When an Appeal Lies.** An appeal lies from any order or judgment in a criminal proceeding where the law provides for such appeal, and from any judgment of conviction:
> (1) upon a plea of not guilty; or
> (2) upon a plea of guilty or nolo contendere, if:

(i) the defendant entered into a plea agreement under Rule 11(e) but explicitly reserved with the consent of the state and of the court the right to appeal a certified question of law that is dispositive of the case, and the following requirements are met:
(A) the judgment of conviction, or other document to which such judgment refers that is filed before the notice of appeal, must contain a statement of the certified question of law reserved by defendant for appellate review;
(B) the question of law must be stated in the judgment or document so as to identify clearly the scope and limits of the legal issue reserved;
(C) the judgment or document must reflect that the certified question was expressly reserved with the consent of the state and the trial judge; and
(D) the judgment or document must reflect that the defendant, the state, and the trial judge are of the opinion that the certified question is dispositive of the case; or
(ii) the defendant seeks review of the sentence set and there was no plea agreement under Rule 11(e); or
(iii) the error(s) complained of were not waived as a matter of law by the plea of guilty or nolo contendere, or otherwise waived, and if such errors are apparent from the record of the proceedings already had; or
(iv) the defendant explicitly reserved with the consent of the court the right to appeal a certified question of law that is dispositive of the case, and the requirements of subsection (i) are met, except the judgment or document need not reflect the state's consent to the appeal or the state's opinion that the question is dispositive.

Tennessee Rule of Appellate Procedure 3(b) (2005) states:

> **(b) Availability of Appeal as of Right by Defendant in Criminal Actions.** In criminal actions an appeal as of right by a defendant lies from any judgment of conviction entered by a trial court from which an appeal lies to the Supreme Court or Court of Criminal Appeals: (1) on a plea of not guilty; and (2) on a plea of guilty or nolo contendere, if the defendant entered into a plea agreement but explicitly reserved the right to appeal a certified question of law dispositive of the case pursuant to and in compliance with the requirements of Rule 37(b)(2)(i) or (iv) of the Tennessee Rules of Criminal Procedure, or if the defendant seeks review of the sentence and there was no plea agreement concerning the sentence, or if the issues presented for review were not waived as a matter of law by the plea of guilty or nolo contendere and if such issues are apparent from the record of the proceedings already had. . . .

In this case, Taylor's guilty plea does not fit within any of the exceptions to the aforementioned rules. First, Taylor did not reserve the right to appeal a certified question of law dispositive of the case. See Tenn. R. Crim. P. 37(b)(2)(i) or (iv) (2005); Tenn. R. App. P. 3(b)(2) (2005). Second, Taylor's contention that his plea was not voluntary does not challenge his sentence. See Tenn. R. Crim. P. 37(b)(2)(ii) (2005); Tenn. R. App. P. 3(b)(2) (2005). Therefore, the only exception that remains is Tennessee Rule of Criminal Procedure 37(b)(2)(iii), which states "the error(s) complained of were not waived as a matter of law by the plea of guilty or nolo contendere, or otherwise waived,

and if such errors are apparent from the record of the proceedings already had[.]" Tenn. R. Crim. P. 37(b)(2)(iii) (2005) (emphasis added); see also Tenn. R. App. P. 3(b)(2) (2005). The Advisory Commission Comment to this rule states that the exception found in Rule 37(b)(2)(iii) applies "in cases where guilt was not contested but the record clearly reflects an invalidating error, such as the clear denial of the right to counsel or a conviction under an invalid statute, wherein it would be judicially inefficient to require a post-conviction collateral attack when the error is apparent upon the face of the existing record." Tenn. R. Crim. P. 37(b)(2)(iii) (2005), Advisory Comm'n Comment (emphasis added).

In Wilson, the Tennessee Supreme Court explained that an appellate court could determine the voluntariness of a plea from the record on direct appeal only in very limited circumstances:

> Unlike the denial of the right to counsel or conviction under an invalid statute, whether a defendant knowingly and voluntarily entered a guilty plea will rarely, if ever, be apparent from a record of the "proceedings already had. . . ." Tenn. R. Crim. P. 37(b)(2)(iii); see Tenn. R. App. P. 3(b)(2). Such is not apparent in the record before us; [the defendant's] claim that his guilty plea was not knowingly and voluntarily entered does not fit, therefore, within the exception provided by Tenn. R. Crim. P. 37(b)(2)(iii). See Tenn. R. Crim. P. 37(b)(2)(iii); see also Tenn. R. App. P. 3(b)(2).

Wilson, 31 S.W.3d at 193. Furthermore, the court reasoned that a fully developed record is necessary to determine the voluntariness of the plea:

> It will be difficult, and perhaps impossible, for an intermediate court, reviewing only the record of the plea submission hearing, to make an accurate determination of the knowing and voluntary nature of a plea. Post-conviction proceedings, however, permit the development of a record to fully examine whether a defendant understood his or her rights and whether he or she voluntarily waived them by pleading guilty.

Id. at 195.

Taylor, like the defendant in Wilson, cites State v. Mackey to support his contention that challenges to the voluntariness of a guilty plea can be heard on direct appeal. See Mackey, 553 S.W.2d at 340. However, the Tennessee Supreme Court held that reliance on Mackey for this proposition is flawed:

> While Mackey did involve a direct appeal from a guilty plea on the basis of a potential Boykin[2] error, the decision contains no discussion as to the propriety of such an appeal. Moreover, Mackey was decided on June 20, 1977, prior to the

[2] Boykin v. Alabama, 395 U.S. 238, 242, 89 S.Ct. 1700, 1711 (1969) (holding that "[i]t was error, plain on the face of the record, for the trial judge to accept petitioner's guilty plea without an affirmative showing that it was intelligent and voluntary.").

> effective dates of the Tennessee Rules of Criminal Procedure (July 13, 1978) and the Tennessee Rules of Appellate Procedure (July 1, 1979). Significantly, both Tenn. R. Crim. P. 37(b) and Tenn. R. App. P. 3(b) restrict the right to a direct appeal from a guilty plea to the narrow exceptions previously enumerated. It is presumed that in ratifying both of these rules, the General Assembly was aware of our decision in Mackey. See Owens v. State, 908 S.W.2d 923, 926 (Tenn. 1995). Accordingly, to the extent that Mackey could be read to allow a defendant a direct appeal from a guilty plea on the basis of an alleged Boykin error, that portion of Mackey has been superceded by the rules which limit the right to a direct appeal to the exceptions enumerated in Tenn. R. Crim. P. 37(b) and Tenn. R. App. P. 3(b).

Wilson, 31 S.W.3d at 193. Instead, the court held that "the proper forum for asserting that a plea was not knowingly or voluntarily entered in accordance with Boykin is in a post-conviction proceeding."[3] Id. at 194. The voluntariness of a plea is really a constitutional issue because "[t]he due process provision of the federal constitution requires that pleas of guilty be knowing and voluntary." Id. (quoting Johnson v. State, 834 S.W.2d 922, 923 (Tenn. 1992) (citing Boykin, 395 U.S. 238, 243, 89 S.Ct.1709, 1712 (1969)). Therefore, "a claim . . . which asserts that a plea was not voluntarily and knowingly entered, implicates [a defendant's] due process rights and therefore falls squarely within the ambit of issues appropriately addressed in a post-conviction petition." Id.

We are unable to properly evaluate the voluntariness of Taylor's guilty pleas upon direct appeal. Although the record includes the transcript from the plea submission hearing, we do not have enough information to determine whether Taylor knew his rights and voluntarily waived these rights to enter his guilty pleas. The Tennessee Supreme Court has repeatedly held that guilty plea challenges involving Boykin errors should be raised in post-conviction proceedings.[4] Therefore, we conclude that it was improper for Taylor to bring the issue of the voluntariness of his plea before this court on direct appeal.

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[3] The Tennessee Supreme Court in Wilson also suggested an alternate way to challenge a guilty plea:

> [A] defendant may challenge his or her guilty plea on the basis of an alleged Boykin error which does not involve a direct appeal under either Tenn. R. Crim. App. 37(b)(2) or Tenn. R. App. P. 3(b)(2). The defendant may file a motion to withdraw the plea under Tenn. R. Crim. P. 32(f). See Tenn. R. Crim. P. 32(f) ("A motion to withdraw a plea of guilty may be made upon a showing by the defendant of any fair and just reason only before sentence is imposed; but to correct manifest injustice, the court after sentence, but before the judgment becomes final, may set aside the judgment of conviction and permit the defendant to withdraw the plea."). A direct appeal then lies from a denial of a Rule 32(f) motion. See State v. Newsome, 778 S.W.2d 34 (Tenn. 1989).

Wilson, 31 S.W.3d at 195.

[4] Wilson, 31 S.W.3d at 195 ("[O]ur holding, that challenges to guilty pleas on the basis of alleged Boykin errors are properly raised in post-conviction proceedings rather than on direct appeal, is not a novel proposition.") (citing Blankenship v. State, 858 S.W.2d 897 (Tenn. 1993); Archer v. State, 851 S.W.2d 157 (Tenn. 1993); State v. Prince, 781 S.W.2d 846 (Tenn. 1989)).

III. Length and Manner of Sentence. As to Taylor's remaining issues, challenging both the length and the manner of his sentence, we similarly remand this case for resentencing because this court has no way of determining whether the trial court applied the pre-2005 sentencing act or the amended sentencing act in arriving at Taylor's sentence.

In the wake of Blakely v. Washington,[5] the Tennessee legislature passed a new sentencing law eradicating the presumptive sentences and establishing advisory sentencing guidelines. This amended sentencing act became effective on June 7, 2005. A year and a half later, on January 22, 2007, the United States Supreme Court held that California's sentencing laws, which were very similar to Tennessee's pre-2005 sentencing act, violated the Sixth Amendment right to a jury trial, based on Blakely. See Cunningham v. California, 549 U.S. 270, — , 127 S.Ct. 856, 859 (2007). On October 9, 2007, in light of Blakely and Cunningham, the Tennessee Supreme Court held that a defendant's Sixth Amendment right to a jury trial is violated when a trial court enhances a defendant's sentence using factors that were not found by a jury beyond a reasonable doubt. State v. Gomez, 239 S.W.3d 733, 740 (Tenn. 2007) (citing Cunningham v. California, 549 U.S. 270, — ,127 S.Ct. 856, 860 (2007)). Recently, this court concluded that "[t]he presumptive sentence may be exceeded without the participation of a jury only when the defendant has a prior conviction and/or when an otherwise applicable enhancement factor was reflected in the jury's verdict or was admitted by the defendant." State v. Blackburn, No. W2007-00061-CCA-R3-CD, 2008 WL 2368909, at *14 (Tenn. Crim. App., at Jackson, June 10, 2008).

The Compiler's Notes to amended Tennessee Code Annotated section 40-35-210 (2006) identified the eligible defendants who could elect the pre-2005 sentencing act or the amended sentencing act:

> Offenses committed prior to June 7, 2005, shall be governed by prior law, which shall apply in all respects. However, for defendants who are sentenced after June 7, 2005, for offenses committed on or after July 1, 1982, the defendant may elect to be sentenced under the provisions of the act by executing a waiver of such defendant's ex post facto protections. Upon executing such a waiver, all provisions of the act shall apply to the defendant.

Taylor committed the two crimes in this case on November 13, 2004, before the new sentencing act's effective date of June 7, 2005. Because Taylor was not sentenced until September 9, 2005, he had the option of being sentenced under the pre-2005 sentencing act or the amended sentencing act. There is no waiver of Taylor's ex post facto protections in the record. This would normally mean that Taylor's sentence would be governed by the pre-2005 sentencing law; however, Taylor's attorney specifically stated at the sentencing hearing that his sentence would be governed by the "newer" act, meaning the amended sentencing act. Although Taylor did not sign a waiver of

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[5] "'Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.'" Blakely v. Washington, 542 U.S. 296, 301, 124 S. Ct. 2531, 2536 (2004) (quoting Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S. Ct. 2348, 2362-63 (2000)).

his ex post facto protections, he did sign a document entitled "Petition to Enter Plea of Guilty, Waiver of Trial by Jury, and Waiver of Jury Determination of Sentence Enhancement Factors."

The aforementioned document specifically states, among other things, that a judge must start with the "minimum sentence in the range" except for A felonies where "the starting sentence is the midpoint in the range." This language directly corresponds to the "presumptive minimum sentences" language in the pre-2005 sentencing act. In addition, the presentence investigation report lists four enhancement factors and cites the identifying factor numbers for both the pre-2005 sentencing act and the amended sentencing act for three of these factors. The remaining enhancement factor, factor (17), does not have a counterpart in the amended sentencing act.

The same four enhancement factors are noted in the Sentencing Memorandum of James Albert Taylor prepared by the public defender's office. However, this sentencing memorandum does not cite to specific factor numbers and does not identify whether these factors are from the pre-2005 sentencing act or the amended sentencing act. Additionally, the trial court does not mention any enhancement or mitigating factors during the sentencing hearing. Further, the only mention of Taylor's election was at the very beginning of the sentencing hearing when defense counsel stated that Taylor elected to be governed by "the newest" sentencing act. Finally, the record does not indicate whether the trial court began its sentencing consideration for Taylor's two Class C felonies at the presumptive minimum sentence, as required by the pre-2005 sentencing act, or not.

The record does make it clear that the trial court sentenced Taylor as a Range II, multiple offender. See T.C.A. § 40-35-106(c). For a Range II offender, the sentence range is six to ten years for the offenses of aggravated burglary and aggravated assault, both Class C felonies. See T.C.A. § 40-35-112(b)(3). Here, the trial court imposed the minimum sentence for the aggravated burglary conviction and the maximum sentence for the aggravated assault conviction, to run concurrently, which resulted in an effective ten-year sentence.

Because the record is unclear regarding which sentencing scheme applied in Taylor's case, we remand the case so that Taylor can elect either (1) the pre-2005 sentencing act, or (2) the amended sentencing act upon his written waiver of his ex post facto protections. See State v. Quincy Bryan Banks, No M2007-00545-CCA-R3-CD, 2008 WL 1699440, at *7 (Tenn. Crim. App., Nashville, Apr. 11, 2008), perm. to appeal denied (Tenn. Aug. 25, 2008). At the resentencing hearing for this case, neither Taylor nor the State is limited to the proof that they presented at the September 9, 2005 sentencing hearing. Id. Each party may submit additional evidence that is relevant and permitted under the sentencing scheme that Taylor elects. Id. Given the posture of this case, we similarly note that Taylor is not prohibited from filing a motion to withdraw his guilty plea. We are also remanding this case so that the trial court can determine whether an alternative sentence should be imposed, upon Taylor's election of a sentencing scheme in this case.

Conclusion. Taylor's judgments of conviction for aggravated burglary and aggravated assault are reversed. The sentences imposed by the trial court for these convictions are vacated, and we remand the case to the trial court for a resentencing hearing to determine the length and manner of his sentence, following Taylor's election to proceed under either the pre-2005 sentencing act or

the amended sentencing act accompanied by Taylor's written waiver of his ex post facto protections.

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CAMILLE R. McMULLEN, JUDGE